Office-Supreme Court, U.S.
FILED
DEC 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-529

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHARPE AND SAVAGE IN OPPOSITION

MARK J. KADISH
ALAN J. BAVERMAN
KADISH & KADISH, P.C.
955 W. Wesley Road, N.W.
Atlanta, Georgia 30327
(404) 351-6200

LARRY TURNER
P. O. Box 508
Gainesville, Florida 32602
(904) 375-4460

GEDNEY HOWE
P. O. Box 1440
Charleston, South Carolina 29402
(803) 577-6303

BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Whether a subsequent petition for certiorari, after the initial petition had been granted but resulted in an unfavorable resolution for petitioner, is barred by the principle of the finality of judicial proceedings?

(2) Whether the length of the detentions of Sharpe and Savage effectively transformed them into *de facto* arrests without basis or probable cause, making them unreasonable seizures under the Fourth Amendment?

(3) Whether evidence seized as a result of the unlawful detentions should be suppressed?

(4) Whether the questions presented by the petition are worthy of certiorari, since their resolution in favor of petitioner would not be dispositive of this case?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
REASONS FOR DENYING THE PETITION	9
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Page

Cases

Adams v. Williams, 407 U.S. 143 (1972) 13

Brown v. Illinois, 422 U.S. 590 (1975) 15

Davis v. Mississippi, 394 U.S. 721 (1969) 12

Dunaway v. New York, 442 U.S. 201 (1979) 6, 12

Florida v. Royer, ___ U.S. ___, 103 S.Ct. 1319 (1983) 13, 14

Hathorn v. Lovorn, 475 U.S. 255 (1982) 9

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 9

Michigan v. Summers, 452 U.S. 692 (1981) 8, 10, 11, 12, 13

Reid v. Georgia, 448 U.S. 438 (1980) 12

Robbins v. California, 453 U.S. 420 (1981) 7, 9

Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981).. 10

Sharpe v. United States, 712 F.2d 65 (4th Cir. 1983)... 9

Steagald v. United States, 451 U.S. 204 (1981) 16

Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664 (1982) 15

Terry v. Ohio, 392 U.S. 1 (1968) 5, 9, 12, 13

United States v. Brignoni-Ponce, 22 U.S. 873 (1975) 12, 13

United States v. Cortez, 449 U.S. 411 (1981) 12, 14

United States v. Place, ___ U.S. ___, 103 S.Ct. 2637 (1983) 12, 13

United States v. Ross, 456 U.S. 798 (1982) 8, 9

United States v. Sharpe, 457 U.S. 1127 (1982) 8

Wong Sun v. United States, 371 U.S. 471 (1963) 6, 16

TABLE OF AUTHORITIES (Continued)

Page

Constitution and Statute

Fourth Amendment, United States Constitution ..... i, 6, 7, 10, 12

Fourteenth Amendment, United States Constitution 6, 13

21 U.S.C. §841(a)(1) 2

28 U.S.C. §1254(1) 2

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-529

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHARPE AND SAVAGE IN OPPOSITION

The Respondents respectfully request that the United States' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit be denied

OPINIONS BELOW

The opinion of the Court of Appeals subsequent to this Court's remand (Pet. App. A, 1a-13a) is reported at 712 F.2d 65. This Court's order granting the prior petition for a writ of certiorari, vacating the prior judgments of the Court of Appeals, and remanding the case to the Court of Appeals, is reported at 457 U.S. 1127. The initial opinion of the Court of Appeals (Pet. App. B, 14a-51a) is reported at 660 F.2d 967. The District Court issued no written opinion.

JURISDICTION

The judgments of the Court of Appeals (Pet. App. C, 52a and 53a) on remand from this Court were entered on June 30, 1983. On August 22, 1983, Justice Brennan extended the time in which the United States could file a Petition for a Writ of Certiorari to and including September 28, 1983. Respondents were served with a copy of the Petition on October 10, 1983. On November 9, 1983, Respondents filed a letter brief in opposition with the Clerk of this Court. On November 21, 1983, Respondents were directed to file a formal response by December 21, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In a 2-1 decision the Court of Appeals reversed respondents' convictions.

1. The evidence showed that on June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking. (Tr. 35-36) At approximately 6:30 A.M., Cooke observed a blue pickup truck with an attached camper shell travelling in tandem with a blue Pontiac. Observing that the truck was riding low in the rear and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. (Tr. 39-41) After approximately twenty miles, Cooke determined that he would stop the vehicles and he dispatched a request for aid, to which

South Carolina Highway Patrolman Thrasher responded. (Tr. 44-47)

Some time after Thrasher joined the procession, the Pontiac and the truck turned onto a loop road through a campground. At no time prior to the turn had the occupants of the truck or vehicle signalled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. Thrasher testified that the truck and Pontiac were travelling between 55 and 60 MPH, although the posted speed was 35 MPH. (Tr. 52) At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe; the license was in the name of Raymond J. Pavlovich. (Tr. 54) Sharpe and his passenger Davis (the charges against whom were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. (Tr. 54-57, 100-101) Asking the local police to "maintain the situation," Cooke turned custody of Sharpe and Davis over to them and left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn, had ordered the driver to get out of the truck and to assume a spread-eagled position against its side, and had searched him. At Thrasher's request, the driver had produced a Florida license identi-

fying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop but indicated that he would hold him there until Cooke arrived. Savage had then requested the return of his license and permission to leave. Thrasher had refused to return the license and told Savage that he was not free to leave, as he was under custodial arrest, and that he could detain Savage on speeding charges if necessary. (Tr. 146-150, 163-165)

When Cooke arrived approximately fifteen minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper and was refused both times. Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it, finding a number of highly compressed, well-wrapped burlap bales but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac, where he placed Sharpe under arrest. By the time Sharpe was arrested, approximately thirty to forty minutes had elapsed since Cooke had first stopped the Pontiac.

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained forty-three intact bales. Eight randomly selected bales were then

searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales and stored them in a vault in his office; the rest were destroyed by fire, under the direction of the Assistant United States Attorney and without permission of the district court. (Tr. 221-222, 151-154)

2. On appeal, a panel of the Fourth Circuit Court of Appeals reversed Respondents' convictions in a 2-1 decision. (Pet. App. B, 14a-51a). The circuit court interpreted this Court's cases concerning investigatory field stops of vehicles to require a reasonable suspicion by the officer of illegality supported by articulable and objective facts, and that the stop must be brief. (Pet. App. B, at 18a-19a). The Court assumed "without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking" when the officers stopped the vehicles that Respondents were driving. (*Id.* at 19a). However, the Court concluded that the stops failed to meet the requirement of brevity. (*Ibid.*) The Court then noted that it was the transitory nature of the stop that justifies the elimination of the probable cause requirement, recognizing that when this Court transposed the stop and frisk rationale of *Terry v. Ohio*, 392 U.S. 1 (1968), to the vehicle stop situation, the Court "was careful to emphasize the de minimus nature of such stops in justifying the intrusion under the Fourth Amendment." (Pet. App. B, at 19a). Thus, the Court found that Sharpe was detained without probable cause for arrest for 30-40 minutes before Cooke returned to the Pontiac to arrest him, and Savage was held under custodial arrest without probable cause by Thrasher for at least 15 minutes before being questioned and finally ar-

rested by Cooke. "Indeed, the length of the detentions effectively transformed them into de facto arrests without basis and probable cause," thereby converting the stops into unreasonable seizures under the Fourth Amendment. (Pet. App. B, at 20a).

Then, obtaining guidance from *Dunaway v. New York*, 442 U.S. 201 (1979), the appeals court found that the detentions of Sharpe and Savage were like that detention in *Dunaway*, because the lengthy detentions of Respondents by the law enforcement officers, who had no intention of allowing Respondents to leave custody, closely resembled traditional arrests. Therefore, since probable cause did not exist prior to the detentions, the Court viewed them as illegal seizures under the Fourth and Fourteenth Amendments. (Pet. App. B, at 20a-21a).

Having determined that Sharpe and Savage were illegally detained, the Court inquired into whether the bales of marijuana that Cooke uncovered during the search of the truck should have been suppressed as fruits of the illegality under *Wong Sun v. United States*, 371 U.S. 471 (1963). Recognizing that *Wong Sun* directed a court to inquire, pursuant to a proper "fruits" analysis, "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (citing *Wong Sun* at 488), the Court held that the officer would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not been detained for longer than constitutionally permissible under an investigatory stop. (Pet. App. B, at 22a).

The Court also rejected Petitioner's argument that

Cooke's olfactory find supplied the probable cause, holding that Cooke's smelling of the marijuana was so intertwined with the circumstances of the unlawful detentions that it could not have purged the illegal taint of those detentions and could, therefore, not have served as probable cause for a search. (*Ibid.*)

As an alternative ground for mandating suppression of the fruits of the unlawful detention, the Court of Appeals held that the officer's warrantless search of the burlap-wrapped marijuana bales discovered in the pick-up truck violated the Fourth Amendment. (Pet. App. B, 23a-25a). The Court concluded that under the analysis in *Robbins v. California*, 453 U.S. 420 (1981), the warrantless search of the bales was impermissible.

Because of the resolution of the issues on appeal, the Court did not address the questions of (1) whether the District Court properly refused to suppress Sharpe's license and the bill of sale for the truck; and (2) whether the marijuana was subject to suppression on the alternative ground that Respondents suffered prejudice from the destruction of the marijuana without notice to them. (Pet. App. B, at 22a and 25a).

Circuit Judge Russell dissented, stating that a balancing test was necessary in order to examine the reasonableness of the search and seizure. He also would have found that the intrusion in this case was minimal and that the delay was occasioned by the Respondents themselves. (Pet. App. B, 26a-51a).

3. After rehearing *en banc* was denied by an equally divided court (See No. 81-1736, Petitioner's App. 39a-40a), the United States petitioned for certiorari in this Court. Questions presented were (1) Whether law enforcement officers may detain an individual suspected of

criminal activity for a limited but more than momentary period in order to pursue the investigation; (2) Whether the marijuana seized from the vehicle was suppressible as a fruit of the detentions; and (3) Whether the constitution required a warrant prior to the searching of the burlap bales in the rear of the truck. This Court granted certiorari on June 21, 1982, vacated the judgment of the Fourth Circuit, and remanded the case to the Fourth Circuit for further consideration in light of *United States v. Ross*, 456 U.S. 798 (1982). *United States v. Sharpe*, 457 U.S. 1127 (1982). Justice Stephens, joined by Justices Brennan and Marshall dissented because *United States v. Ross* shed no light on the proper disposition of whether the warrantless search itself was legitimate. 457 U.S. at 1128.

4. On remand, the Court of Appeals again reversed the convictions 2-1. (Pet. App. A, 1a-13a). The majority concluded that by virtue of *Ross*, the alternative basis for the previous decision was no longer valid. (Pet. App. A at 2a). However, the majority found that *Ross* did not adversely affect the primary holding that the initial stop of the vehicles and the lengthy detention of the respondents constituted illegal seizures. The majority therefore readopted the original majority opinion as modified and again reversed the convictions. (*Ibid.* at 2a-3a).

Judge Russell again dissented, concluding that this Court's remand required consideration of both alternative grounds of decision. He argued that the decision of the majority was inconsistent with *Michigan v. Summers*, 452 U.S. 692 (1981), and failed to take into account respondent's responsibility for the length of the detention. (Pet. App. A, 8a-9a). Prior to the entry of the Court of Appeals' judgment on remand, the opinions were circu-

lated to the full Court. Suggestion for *sua sponte en banc* reconsideration was made by a member of the Court but failed to garner the necessary majority vote. However, the opinions on remand reflect the full Court voted 5-4 to affirm the panel opinion (Pet. App. A, 3a, 4a, 13a).

REASONS FOR DENYING THE PETITION

1. In its original petition in this case, No. 81-1736, the United States sought review on both *Terry v. Ohio*, 392 U.S. 1 (1968), and the *Robbins v. California*, 453 U.S. 420 (1981)/*United States v. Ross*, 456 U.S. 798 (1982), issues. This Court granted the petition, and remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Ross*. The Court's explicit order was followed by the lower court, which readopted the original opinion, once modified to be consistent with the principles enunciated in *Ross*. *Sharpe v. United States*, 712 F.2d 65 (4th Cir. 1983).

While an initial denial of certiorari has no precedental or preclusive effect on subsequent petitions, *Hathorn v. Lovorn*, 475 U.S. 255, 262, n. 11 (1982), citing *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1 (1973), the appellate history of this case presents a different posture. Since this Court granted the government's original petition on both issues, and remanded only so that the Fourth Circuit could correct its opinion to conform with *Ross*, this second petition amounts to an attempt to reargue that which is already the "law of the case". It is improbable that this Court granted certiorari in No. 81-1736 and disapproved of the Fourth Circuit's handling of the *Terry* issue through a silent and implicit reprimand, as Judge Russell concluded in his dissent. See *Sharpe v. United States, supra*, 712 F.2d at

66-67 (Russell, J., dissenting). Rather, the Fourth Circuit was instructed to review its alternative decision in light of *Ross*, because the panel opinion concerning the "bright line" in Fourth Amendment container cases was no longer valid. Thus, a second petition after certiorari had been granted previously amounts to an attempt by petitioner for a "second bite at the apple"; and thus, is inconsistent with the important principle of the finality of judicial proceedings.

2. In addition, as noted in respondent's opposition to the first petition, the court below did not hold, contrary to petitioner's contention (at Pet. 11), that absent probable cause, investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment, without regard to the facts or circumstances that affect the duration of the detention.

Rather, the Court held that the lengthy detentions of Sharpe and Savage by law enforcement officers, who had no intention of allowing them to leave custody, closely resembled traditional arrests and, not being grounded on probable cause, were unconstitutional seizures. Review of the opinions below establishes not a *per se* rule, but that the thirty to forty minute "de facto" arrest of Sharpe and the fifteen to twenty minute "de facto" arrest of Savage, both without probable cause, transformed them into "traditional" arrests. Pet. App. B; *Sharpe v. United States*, 660 F.2d 967, 970 (4th Cir. 1981).

(a) *Michigan v. Summers*, 452 U.S. 692 (1981), cited by petitioner in support for its position, is inapposite to the instant case. Factually, *Summers* offers little guidance to this case, since it concerned detention of an occupant of the premises being searched pursuant to a *search warrant*. Significantly, the *Summers* Court compared the

intrusion upon Summers, as opposed to that intrusion which would obtain upon a formal arrest, and held that "of prime importance" was the fact that the police had obtained a warrant to search Summers' house for contraband. "A neutral and detached magistrate . . . had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701. Moreover, this Court noted that the type of detention imposed upon Summers was not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officer sought normally would be obtained through the search and not through the detention.

Contrasted to the instant case is the fact that respondent Sharpe was pulled over and detained without ever being informed of the nature of the detention or the reason for it. Likewise, respondent Savage was detained by Officer Thrasher for fifteen to twenty minutes prior to the arrival of Agent Cooke. Upon Cooke's arrival, he twice requested that he be allowed to search the camper, and was refused both times. It was at that point that Cooke approached the rear of the truck to perform his olfactory investigation. Thus, the opposite from *Summers* occurred here; the officers used the detention to gain information to justify the search, rather than the detention merely being incidental to a valid right to search.

In conclusion, *Michigan v. Summers* stands for the proposition that for Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it limited authority to detain the occupants of the premises while a proper search is conducted. 452 U.S. at 705. In fact, the Court rejected the "multi-factor balancing test of 'reasonable police conduct

under the circumstances' " to cover all seizures that do not amount to technical arrests, which Justice Russell and petitioner urge upon the Court. Significantly, the *Summers* Court cited from *Dunaway v. New York*, 442 U.S. 200, 213 (1979), where it was noted:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime."

(b) Thus, although the court below did not issue a *per se* rule concerning the time of any investigatory stop, it concluded that the detentions of Sharpe and Savage violated the "brevity" prong of this Court's cases concerning seizures based on less than probable cause. Its conclusion was perfectly consistent with these precedents. See *United States v. Cortez*, 449 U.S. 411 (1981) (the Fourth Amendment applies to seizures of the person, including *brief, investigatory stops* such as the stop of the vehicle here); *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *United States v. Brignoni-Ponce*, 22 U.S. 873, 878 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968). (emphasis supplied).

Recently, in *United States v. Place*, ____ U.S. ____, 103 S.Ct. 2637 (1983), this Court held that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage *briefly*, and to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. Thus, the Court concluded in *Place* that the length of the de-

tention of respondent's luggage alone precluded the conclusion that the seizure was reasonable in the absence of probable cause, stating that although the reasonableness of seizures longer than the momentary ones in *Terry*, *Adams v. Williams*, 407 U.S. 143 (1972), and *Brignoni-Ponce* had been recognized, the brevity of the invasion of the individual's Fourth Amendment interest is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. *United States v. Place*, *supra*, 103 S.Ct. at 2645.

Moreover, in *Florida v. Royer*, ___ U.S. ___, 103 S.Ct. 1319 (1983), the Court held that *Terry* and its progeny created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be investigative yet violative of the Fourth Amendment absent probable cause. In the name of investigation, a person who is no more than suspected of criminal activity cannot be subjected to a full search of his person or of his automobile or other effects. "Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer*, *supra*, 103 S.Ct. at 1325.

Finally, the *Royer* Court concluded that "an investigative detention must be *temporary* and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative method employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*

This Court's analysis in *Summers* and the other cases demonstrates that a law enforcement officer making a valid *Terry* stop lawfully may detain a suspect for more than a brief moment, if such action is reasonably required

in order to pursue a legitimate avenue of investigation. Here, however, respondents were detained and not told the reason for their detention. Under the facts of this case, Sharpe's detention for thirty-five to forty minutes and Savage's detention for fifteen to twenty minutes were not reasonable under these circumstances.

(c) In addition, it is clear that the court below considered the totality of the circumstances which petitioner urges. See *United States v. Cortez*, *supra*, at 417-418; *Florida v. Royer*, *supra*. The Court did not find the delay attributable to the evasive action taken by respondent Savage. The petitioner's conclusion to this effect has no basis in fact, and is contrary to the factual findings of the court below. Rather, the lengthy detention was instead due to the officer's conduct: (1) the officers followed respondents for over 21 miles before deciding to stop the vehicles; (2) the officers were unsuccessful in making radio communication once the vehicles were stopped; (3) it took the Myrtle Beach police officers over ten minutes to appear on the scene; (4) although *several* officers and agents were surrounding each vehicle, not one officer could tell the drivers why they were being detained; (5) there is nothing in the testimony that shows any "ploy" by Savage to evade officers; and (6) the lengthy delay was caused by Agent Cooke's failure to communicate with the several officers assisting him and by all the officers' failure to follow proper procedure.

Since the court below carefully considered the facts of this case and correctly applied the facts to the current United States Supreme Court law, the petition of the United States should be denied.

3. The court below was correct in its application of the exclusionary rule. Agent Cooke admitted that the

stop of Sharpe and Savage was based on the appearance of the pick-up truck and was a profile stop. Thrasher testified that he knew in his mind that the truck they were following contained marijuana.

Once the stop was made, Sharpe was not questioned about the suspicions but yet was not free to go on his way. He was placed in a police car; his license had been seized and he was detained for approximately forty minutes. Thus, the court below correctly determined that this was a custodial arrest without probable cause.

If illegal detention for an extended period of time, without prior probable cause, is not deterred by implementation of the exclusionary rule, then police officers will be judicially licensed to illegally detain suspects, without probable cause for extended periods of time, until the will of the suspects succumbs to the coercive effect of illegal police action. Thus, all fruits of the illegal detention, including the Georgia drivers license in the name of Raymond J. Pavlovich (which is the only evidence which connects Sharpe to the Ford truck), and the marijuana, must be suppressed.

Brown v. Illinois, 422 U.S. 590 (1975), identified several factors that should be considered in determining whether a confession has been purged by the taint of the illegal arrest: (1) the temporal proximity of the arrest and the confession; (2) presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct. 422 U.S. at 603-604. See also *Taylor v. Alabama*, ____ U.S. ____, 102 S.Ct. 2664, 2667 (1982). These factors equally are applicable to this illegal detention/illegal search fact situation. Temporally, Sharpe was detained unlawfully, while Agent Cooke went about seeking to satisfy his suspicions about the contents of the

truck. No intervening circumstances occurred except for the unlawful detention of respondent Savage. Third, the purpose of the lengthy and unlawful detentions of respondents was so that the officers could get a look inside the camper shell of the truck. The delayed detention of Sharpe by Cooke, in tandem with the delayed detention of Savage by Thrasher prior to interrogation by Cooke, represents flagrant practices by the officers. If the stop of Savage had been more than just a mere pretext to see what was in the camper (such as the traffic violation which Thrasher noted), then these legitimate concerns could have been expeditiously carried out while Thrasher awaited Cooke's arrival. Instead, Savage was just held.

Moreover, the United States has argued in both of its petitions that the discovery of the marijuana following Savage's detention "invaded no right of privacy of person . . . which would entitle [Sharpe] to object to its use at his trial," citing *Wong Sun v. United States*, *supra*, 371 U.S. at 492. However, this "standing" argument should not be raised for the first time in this Court. *Steagald v. United States*, 451 U.S. 204 (1981).

As to respondent Savage, the argument that the marijuana was not a fruit of an unlawful detention is mere sophistry. First, Savage was held for fifteen minutes with no reason explained to him prior to the arrival of Agent Cooke. Then, upon Agent Cooke's arrival, Cooke unsuccessfully attempted to get Savage to consent to a search to the back of the truck. Failing that, Agent Cooke put his olfactory senses to work. Thus, it was this piercing conduct, beyond a check for identification and perhaps a check for weapons, which transformed this encounter/detention into what traditionally has been viewed as a probable cause-requiring arrest. Therefore,

the length of the detention and the scope of the inquiry certainly lead to the discovery of the marijuana.

4. In addition, the Court should deny the petition for certiorari because a grant of the petition and a reversal of the Court of Appeals would not be dispositive of this case. Other meritorious issues were raised but not reached by the Fourth Circuit because of the reversal of respondent's convictions on two grounds. These additional issues include: (1) Whether the facts known to the police authorities at the time they stopped respondents were tenuous and did not provide sufficiently articulable suspicion to justify a stop; and (2) whether the Court erred when it denied respondents' motion to dismiss the indictment due to the destruction of marijuana by the DEA in the absence of notification to defense counsel, and in the absence of a court order. As to the second issue, the Court of Appeals went so far as to say:

> Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence —without defense counsel's knowledge and without leave from the district court—nevertheless seriously concerns us . . . .

(Pet. App. B, 25a, n. 5.)

CONCLUSION

For all the above and foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

KADISH AND KADISH, P.C.

By: _____
MARK J. KADISH

By: _____
ALAN J. BAVERMAN

955 West Wesley Road, N.W.
Atlanta, Georgia 30327
(404) 351-6200

_____
LARRY TURNER

P. O. Box 508
Gainesville, Florida 32602
(904) 375-4460

_____
GEDNEY HOWE

P. O. Box 1440
Charleston, South Carolina 29402
(803) 577-6303

Attorneys for Respondents

CERTIFICATE OF SERVICE

This is to certify that I have this date served the following counsel, with a copy of the within and foregoing Brief in Opposition to Petition for Writ of Certiorari, by depositing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to insure delivery:

Mr. Rex E. Lee, Solicitor General

Mr. Stephen S. Trott
Assistant Attorney General

Mr. Andrew L. Frey
Deputy Solicitor General

Mr. Joshua I. Schwartz
Assistant to the Solicitor General

Mr. John Fichter De Pue
Attorney

Department of Justice
Washington, D.C. 20530

This the _____ day of December, 1983.

MARK J. KADISH